

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

August 19, 2005

OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing
Date of Filing: November 2, 2004
Case Number: TSO-0163

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be granted at this time.

I. Background

The individual owns a company that is a DOE contractor. He requested an access authorization for himself. The local security office conducted a background investigation and found information regarding past drug and alcohol use that created a security concern. In order to resolve that concern, DOE conducted a Personnel Security Interview (PSI) with the individual in March 2003. In April 2003, a DOE consultant-psychiatrist evaluated the individual and diagnosed him as alcohol dependent, in early partial remission and without adequate evidence of rehabilitation or reformation.

In June 2004, DOE informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his eligibility for access authorization. Notification Letter (June 25, 2004). The Notification Letter stated that the derogatory information regarding the individual falls within 10 C.F.R. § 710.8 (f), (j) and (k) (Criteria F, J, and K). DOE invoked Criterion F based on information in its possession that the individual "has deliberately misrepresented, falsified, or omitted significant information from a . . . Questionnaire for Sensitive Positions" Notification Letter at 2. According to the Notification Letter, the individual omitted his use of illegal drugs from his Questionnaire for National Security Positions (QNSP). The DOE Operations Office invoked Criterion J on the basis of information that the individual has been or is a user of alcohol habitually to excess, or has been diagnosed by a board-certified psychiatrist, or other licensed physician or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse. 10 C.F.R. § 710.8 (j). In this regard, the Notification Letter cites the diagnosis of a DOE consultant-psychiatrist that the individual suffers from alcohol dependence, in early partial remission, and without adequate evidence of rehabilitation or reformation. Criterion K is invoked when a person has allegedly trafficked in, sold, transferred, possessed, used, or

experimented with a drug or other substance listed in the Schedule of Controlled Substances except as prescribed or administered by a physician or as otherwise authorized by Federal law. 10 C.F.R. § 710.8 (k). The DOE Operations Office invoked Criterion K based on the individual's admission of illegal drug use during his PSI.

In a letter to DOE Personnel Security, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the DOE consultant-psychiatrist (DOE psychiatrist) testified on behalf of the agency. The individual testified on his own behalf and also elected to call six other witnesses. The transcript taken at the hearing shall be hereinafter cited as "Tr." Various documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." Documents that were submitted by the individual during this proceeding are also exhibits to the hearing transcript and shall be cited as "Indiv. Ex."

II. Analysis

The applicable regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my opinion that the individual's access authorization should not be granted at this time because I cannot conclude that such a grant would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

The individual was arrested eight times between 1970 and 1978 on a variety of charges, including disorderly conduct, reckless driving, larceny, driving with a revoked license, driving while intoxicated, resisting arrest. PSI at 8-47; Ex. 5. He admitted using alcohol at the time of all of the arrests, and admitted using drugs at the time of two of the arrests. PSI at 47-48; Ex. 2 at 2. The individual used illegal drugs from his late teens until he was in his late forties. PSI at 62. According to the individual his last drug use was in 2001, when he used a small amount of marijuana and some cocaine with his then girlfriend. PSI at 51-52, 91. He had been living with his girlfriend, and had a son by her, but moved away from the girlfriend later that year. PSI at 62, 77.

The individual applied for an access authorization for himself (as the owner of a company doing business with DOE), and in June 2002 completed a QNSP. Ex. 4 (QNSP). He did not disclose his police record or his use of drugs on the QNSP. See QNSP, Questions 23-24. However, this information was uncovered during a background investigation, and DOE conducted a PSI with the individual in March 2003. Ex.3 (PSI). During the PSI, the individual admitted his past drug use. PSI at 48-92. He also stated that he was not sure why he had not disclosed his arrests and drug use on his QNSP. PSI at 119-124. The individual agreed to be interviewed by a DOE consultant-psychiatrist at a later date. PSI at 116-118. In April 2003, a DOE consultant-psychiatrist interviewed the individual. DOE Ex. 2 (Report). The psychiatrist concluded that the individual suffered from alcohol dependence, in early remission. Report at 10-11. He also found that the individual did not have a problem with drugs. Report at 11. The psychiatrist recommended that the individual attend an outpatient alcohol program at least once a week for one year, and maintain sobriety for an additional year in order to demonstrate rehabilitation from his alcohol problem. *Id.* at 11-12.

The individual began attending an outpatient alcohol program in August 2004. Tr. at 75. The treatment center evaluated him and recommended that he attend a group session one night a week for six months, and participate in individual counseling once or twice a month. *Id.* at 78. The individual has continued in the program past the six month recommendation, even though his counselor was pleased with his progress and did not believe that he needed more treatment. *Id.*

B. DOE's Security Concerns

The excessive use of alcohol raises a security concern because of its intoxicating effect. "Because the use of alcohol at the very least has the potential to impair a user's judgment and reliability, individuals who use alcohol to excess may be susceptible to being coerced or exploited to reveal classified matters. These security concerns are indeed important and have been recognized by a number of Hearing Officers in similar cases." *Personnel Security Hearing*, OHA Case No. VSO-0417, 28 DOE ¶ 82,798 (2001), quoting *Personnel Security Hearing*, OHA Case No. VSA-0281, 27 DOE ¶ 83,030 at 86,644 (2000). In this case, the individual was diagnosed by a DOE psychiatrist as alcohol dependent and has a history of alcohol-related arrests. Therefore, DOE's security concerns are valid and the agency has properly invoked Criterion J in this case.

Criterion K deals with the use of illegal drugs. Illegal drug use may cause the individual to act in a manner that is inconsistent with the best interests of national security while under the influence of such substances. PSI at 115-116. Also, illegal drug use indicates a willingness to ignore the law that could be reflected in the clearance holder's attitude toward security requirements. See, e.g., *Personnel Security Hearing*, 28 DOE ¶ 82,816 (2001); *Personnel Security Hearing*, 28 DOE ¶ 82,756 (2000). The individual's drug use is well documented in the record, and validates the charge of Criterion K.

The DOE personnel security specialist explained DOE's concerns about falsification during the PSI. PSI at 123-124. She told the individual that DOE security is concerned about the honesty of any person who intentionally omits, falsifies or provides misleading information. *Id.* If statements from the individual conflict with information from the background investigation, then DOE questions the individual's honesty. *Id.* at 124. If an individual is being dishonest, his general character and reliability are in question. *Id.* at 123. Security programs are based on trust, and an individual could be subject to coercion because of a dishonest act. *Personnel Security Hearing*, 28 DOE ¶ 82,829 at 85,871, OHA Case No. VSO-0466 (2001); *affirmed* (OS, April 3, 2002). Based on the record before me, I find that the individual deliberately omitted significant information during his QNSP. 10 C.F.R. § 710.8 (f). Thus the security concern regarding the omission is valid, and the agency has properly invoked Criterion F in this case.

C. Hearing Testimony

1. The DOE Psychiatrist

The DOE psychiatrist testified at the beginning of the hearing that he had reviewed the individual's file prior to the March 2003 interview. Tr. at 13-14. According to the psychiatrist, the material in the files reflected severe problems with alcohol abuse and illegal substance abuse in the individual's past. *Id.* at 17. He also noted that the individual did not disclose his substance problems on his QNSP. *Id.* at 19. Nonetheless, the psychiatrist found the individual to be very open and cooperative during the interview. *Id.* at 20. The individual's blood and urine tests were negative for drugs, but reflected abnormal liver enzymes. *Id.* at 20-24. The psychiatrist diagnosed the individual as alcohol dependent but in early partial remission. *Id.* at 26, 40. In order to show adequate evidence of rehabilitation and reformation, the psychiatrist recommended that the individual attend an outpatient alcohol program once a week for a year and maintain sobriety for a year after that. *Id.* at 40-42. The psychiatrist concluded that the individual had never been dependent on any illegal substance, and believed the individual's assertions that he had not used drugs in a few years. *Id.* at 47. He testified that there was no evidence to support a diagnosis of current substance abuse. *Id.*

2. Other Witnesses

As evidence of rehabilitation and reformation, the individual presented the testimony of two licensed medical professionals (a forensic psychiatrist and a physician who is currently a medical researcher), two colleagues, and a childhood friend.

The forensic psychiatrist testified that he interviewed the individual in March 2005. He concluded that the individual did have a substance abuse problem, but that the problem was currently in remission. Tr. at 102, 109. He also testified that the individual's omissions on the QNSP were not caused by a substance-induced disorder, but rather by his desire to get a job with DOE. *Id.* at 105-107. The medical researcher reviewed the individual's medical records, specifically his elevated liver enzymes and how they related to the diagnosis of alcoholism. *Id.* at 68-69. He discussed the individual's Body Mass Index (BMI), a measure of body fat based on height and weight, and opined that the elevated levels could be attributed to the individual's obesity. *Id.* at 66. The researcher referred to studies of individuals of the same ethnic background, age, and BMI who also had high levels of fat in their livers and, consequently, elevated liver enzymes. He concluded that the abnormal enzyme levels were due to the individual's ethnicity, weight, and medical condition (diabetes), and were inconsistent with continuing alcohol abuse. *Id.* at 68-69.

The alcohol counselor at the treatment program that the individual attended also testified during the hearing. According to the counselor, after evaluating the individual she concluded that he was not alcohol dependent. Tr. at 77-80. She did not test the individual for drugs because she had no reason to suspect that he was using drugs. *Id.* at 80. She recommended that the individual attend one group session per week and also attend individual counseling once or twice a month. *Id.* at 78. The individual completed the recommended six month treatment program, but re-enrolled for an additional six months. *Id.* at 77-78. At the time of the hearing, he had completed a total of eight months of the treatment. *Id.* at 79. The counselor concluded that the individual did not need more treatment, based on his commitment to his health and strong desire to be a good role model for his son. *Id.* at 91. He was very motivated to live a "clean and sober" life because the mother of his son was addicted to drugs. *Id.* at 82. The counselor was not aware of the individual's drug use in 2001. *Id.* at 87.

Other witnesses testified about the individual's good character. A childhood friend testified that the individual was a good loving father who was the primary caretaker for his son because of the mother's drug problem. *Id.* at 131-133. An employee testified that he had never seen the individual drink alcohol. *Id.* at 122. He described the individual speaking well of what he learned in the treatment program. *Id.* at 124. A witness employed by a local government entity that had a contract with the individual's company testified that the individual had passed all random drug tests administered by her group. *Id.* at 112-113. She had never seen him drink. Tr. at 113. She was not aware that he had multiple alcohol-related arrests or illegal drug use in the past, but testified that he did not have a reputation for substance abuse in their community. *Id.* at 118-119.

3. The Individual

The individual testified that his last drug use occurred approximately four years prior to the hearing when he used a small amount of cocaine. Tr. at 142. He took his last drink at a casino in around 2002, approximately three years prior to the hearing. *Id.* at 142-143. He intends to continue with the local alcohol treatment program that he currently attends, and described the positive effect the program has had on his life. *Id.* at 148-149. He admitted

that he did not disclose his arrests and drug use on his QNSP in order to get a clearance and because he felt that his drug problem was far behind him. *Id.* at 137, 152. He explained that he had been self employed for many years and was not used to completing job applications. *Id.* at 137, 152, 156.

D. Evidence of Rehabilitation and Reformation

At the conclusion of the hearing, the DOE counsel asked the psychiatrist to offer an updated diagnosis of the individual's alcohol dependence, based on additional evidence presented at the hearing. Tr. at 163. The DOE psychiatrist concluded that the individual has indeed shown adequate evidence of rehabilitation or reformation from the diagnosis of alcohol dependence in May 2003. *Id.* at 167. He was persuaded by the individual's 14 months of sobriety and eight months attendance at an alcohol treatment program. *Id.* As regards the issue of falsification, the DOE psychiatrist opined that the individual's falsification on his QNSP was not a factor of his substance abuse problem, but rather a reflection of his desire to get a clearance. *Id.* at 168.

In a Part 710 proceeding, the Hearing Officer gives great deference to the expert opinions of mental health professionals regarding rehabilitation or reformation. See *Personnel Security Hearing*, Case No. VSO-0476, 28 DOE ¶ 82,827 (2001). In this case, the DOE psychiatrist persuasively testified that the individual has presented adequate evidence of rehabilitation from the diagnosis of alcohol dependence. The individual's counselor described the individual's enthusiastic participation in the counseling group. The individual has submitted evidence for the record that documents the requisite degree of rehabilitation recommended by the DOE psychiatrist. Thus, I find that the individual has mitigated the security concerns of Criterion J. As regards Criterion K, the individual has not used drugs in four years and has presented evidence of consistently clean drug screens. Both psychiatrists found that he no longer used drugs and his drug involvement was not recent. He has demonstrated his intent not to abuse drugs in the future, in order to be a role model for his son, and has presented a favorable prognosis from two credentialed medical professionals. Based on the above, I further find that the individual has mitigated the Criterion K security concerns.

As regards Criterion F, after reviewing the evidence in the record and assessing the credibility of the individual's testimony at the hearing, I conclude that he has not mitigated the security concern arising from the deliberate omission of significant information on his QNSP. First, the record contains evidence of deliberate falsification or omission. See *Personnel Security Hearing*, Case No. VSO-0466, 28 DOE ¶ 82,829 at 85,872 (2001); *aff'd* (OS April 3, 2002) (describing factors to consider in mitigation of falsification). This is set forth above. The individual last used drugs well within the seven year period referenced in the QNSP. At the hearing, the individual stated that he omitted significant information from his QNSP in order to gain a clearance. Tr. at 137, 153. Second, the individual did not come forward voluntarily to correct the record. DOE discovered the omissions and confronted the individual with the truth during his PSI. Third, the individual maintained the falsification for almost one year. He completed the QNSP in June 2002, and did not correct it until April 2003, when the personnel security specialist asked him about prior arrests and drug use during his PSI.

I find that the individual has not presented sufficient evidence of rehabilitation or reformation from his falsification. At the time of the hearing, it was approximately two years since the falsification in his QNSP response was corrected. That amount of time is not sufficient evidence of reformation from falsification, especially taking into consideration the fact that the individual did not come forward voluntarily to renounce his falsifications. See *Personnel Security Hearing*, Case No. TSO-0008, 28 DOE ¶ 82,910 (2003) (individual maintained falsehoods on QNSP until confronted by personnel security specialist in PSI one year later); *Personnel Security Hearing*, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999) (19 months since last falsification is insufficient evidence of reformation). In summary, this is a case of deliberate falsification of security documents—the individual intended to hide his past from DOE security, and he was not forthcoming until confronted with the truth at his PSI. Even though I do not find a pattern of falsification in the individual's actions, too little time has passed since his falsifications were uncovered for me to find any mitigation of the charge. As hearing officer, I must consider the relevant factors and circumstances connected with the individual's conduct, and I conclude that the individual has not mitigated the Criterion F security concern.

II. Conclusion

As explained in this Decision, I find that the DOE Operations Office properly invoked 10 C.F.R. § 710.8 (f), (j), and (k). However, the individual has presented adequate mitigating factors for Criteria J and K that alleviate the legitimate security concerns of the DOE Operations Office as regards those criteria. Nonetheless, the individual has not mitigated the concerns that gave rise to the charge of Criterion F. In view of that criterion and the record before me, I cannot find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual should not be granted access authorization at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: August 19, 2005